Supreme Court, U.S.
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No. 96-1190

In The

Supreme Court of the United States

October Term, 1997

WENDY L. KERN,

Petitioner,

vs.

CITY OF ROCHESTER; FIRE DEPARTMENT of the City of Rochester; POLICE DEPARTMENT of the City of Rochester; ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department; CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

CULLEY, MARKS, TANENBAUM,
CAPELL & PEZZULO
Attorney for Respondent Local 1071
36 West Main Street, Suite 500
Rochester, New York 146141790
Telephone: (716) 546-7830

Glenn E. Pezzulo, Esq.
Of Counsel

Daily Record Corporation
Rochester, New York
(22066)

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1499 -- August Term, 1995
Argued: May 16, 1996 Decided Aug 15, 1996)
Docket No. 95-9107

WENDY L. KERN,

Plaintiff-Appellant,

v.

CITY OF ROCHESTER, FIRE DEPARTMENT, of the City of Rochester, POLICE DEPARTMENT, of the City of Rochester, ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department, CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE,

Defendants-Appellees.

Before: MESKILL and MINER, Circuit Judges, and LASKER, District Judge.*

Appeal from a judgment of the United States District Court for the Western District of New York (Telesca, C.J.) denying appellant's motions to amend her complaint to add claims under Title VII of the Civil Rights Act of 1964 and dismissing claims asserted by appellant under U.S.C. § 1983.

Affirmed.

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* The Honorable Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation.

EMMELYN LOGAN-BALDWIN, Rochester, NY, for Plaintiff-Appellant.

CHARLES D. STEINMAN, Rochester, NY (Linda S. Kingsley, Corporation Counsel, Rochester, NY, of counsel), for Defendants-Appellees City of Rochester, Fire Department of the City of Rochester, Police Department of the City of Rochester, and Charles D. Ippolito.

BRADLEY A. SHERMAN, Culley, Marks, Tanenbaum, Capell and Pezzulo, Rochester, NY, for Defendant-Appellee Rochester Firefighters Association, Inc., Local 1071 IAFF.

ERICK J. GENSER, Washington, DC (Thomas A. Woodley, Mulholland & Hickey, Washington, DC, of counsel), for Defendant-Appellee International Association of Firefighters.

MINER, Circuit Judge:

Plaintiff-appellant Wendy L. Kern appeals from a judgment entered in the United States District Court for the Western District of New York (Telesca, C.J.) denying her motions to amend her complaint and dismissing the complaint for failure to state claims upon which relief can be granted. Kern alleged in the complaint, inter alia, that defendant-appellees City of Rochester (the "City"), the Fire Department of the City of Rochester (the "RFD"), Daniel Cavuoto, and Charles Ippolito (together, the "City Defendants") were liable, pursuant to 42 U.S.C. § 1983, for unconstitutional employment discrimination. In her first proposed amended complaint, Kern repleaded her § 1983 claims against the City Defendants and added a cause of action for employment discrimination against the City Defendants and defendant-appellee Rochester Firefighters Association, Inc., Local 1071 IAFF ("Local 1071") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. In the first of three Decisions and Orders, the district court found that Kern failed to state a claim under § 1983, and that it would be futile to allow Kern to amend her complaint to add a Title VII action because she could not sustain a Title VII action against either the City Defendants or Local 1071. In her second proposed amended complaint, Kern alleged Title VII violations as her sole federal cause of action. In two subsequent Decisions and Orders, the district court again found that it would be futile to allow Kern to add a Title VII action and therefore denied Kern's motion to amend her complaint. On October 5, 1995, judgment was entered dismissing Kern's complaint.

For the reasons that follow, we affirm the judgment of the district court.

BACKGROUND

In September of 1992, Kern began her employment as a secretary for Local 1071. Local 1071 is the Rochester branch of the International Association of Firefighters and is the collective

bargaining agent of the firefighters employed by the City. Kern's immediate supervisor was Cavuoto, the president of Local 1071. Cavuoto was a Lieutenant in the RFD,[1] and he also operated a private business known as "Life Safety" with his partner, Lloyd Eldridge. The Life Safety offices were located in the same building as the offices of Local 1071.

In her complaint, Kern alleged that Cavuoto sexually harassed her on numerous occasions between September and December of 1992. The alleged harassment initially consisted of Cavuoto's attempts to engage Kern in conversations of a sexual nature, but culminated in Cavuoto's physical assault of Kern on December 30, 1992. On that day, according to the complaint, Cavuoto and Eldridge invited Kern to "have a holiday drink" with them in the Life Safety offices. After consuming some wine, Kern claims that she began to feel "drunk and out of control." She excused herself and went to the bathroom located in the Local 1071 offices. Shortly thereafter, Cavuoto entered the bathroom and pushed Kern against the bathroom sink. Kern resisted Cavuoto's advances and then lost consciousness. According to Kern, when she regained consciousness, she was partially disrobed and lying on the office floor with Cavuoto standing above her naked below the waist. Kern immediately dressed and left the office. The next day, Kern reported the incident to the Rochester Rape Crisis Center. Following the assault, Kern sought the assistance of the Rochester Police Department (the "RFD") and Local 1071. On January 19, 1992, Kern met with John McMenemy, who was the treasurer of Local 1071 and a lieutenant in the RFD, to discuss the alleged assault. McMenemy prepared a report of Kern's allegations, which was signed by Kern and McMenemy. McMenemy then provided

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[1] Pursuant to a contract between the City and Local 1071, Cavuoto was granted "release time" from his job with the RFD to allow him to perform his duties as president of Local 1071. However, Cavuoto still received full pay and benefits from the City as if he were a full-time employee of the RFD.

the report to the City's Corporation Counsel, the executive board of Local 1071, and Ippolito, who at that time was the Chief of the RFD.

On February 24, 1993, Kern and her attorney met with representatives of the RFD to file a criminal complaint against Cavuoto. Kern was introduced to Detective D'Ambrosio and Investigator Ruvio, who told Kern that they would investigate her allegations. Although the detectives commenced an investigation, the record does not indicate that Cavuoto was charged with any crime.

In March of 1993, McMenemy discussed Kern's allegations against Cavuoto with Ippolito. According to Kern, Ippolito told McMenemy that he was "in big trouble" for reporting Kern's allegations to the executive board of Local 1071, and that, not only was his career in the RFD in jeopardy, but also his union position would be lost if "the members [found] out what [he] did." Two days later, McMenemy was denied promotion to Captain in the RFD.

On June 28, 1993, Kern commenced the action giving rise to this appeal. In her complaint, Kern alleged, inter alia, that the City Defendants were liable under § 1983 for violating her rights to equal protection, due process, and free speech. According to Kern, Cavuoto was liable under § 1983 because he sexually harassed and assaulted her during her employment as his secretary, and therefore deprived her of her right to equal protection. Kern further claimed that the City was liable under § 1983 because it had knowledge of Cavuoto's "womanizing," but failed to take any action to discipline him and therefore deprived Kern of her rights to equal protection and due process. Finally, Kern alleged that the RFD and Ippolito were liable under § 1983 because they retaliated against her for complaining of Cavuoto's sexual harassment by denying McMenemy a promotion to Captain in the RFD, and thus deprived her of her First Amendment right to free

speech.

On August 13, 1993, Kern moved to amend her complaint. In the proposed amended complaint, Kern added a cause of action under Title VII against the City Defendants and Local 1071. Kern also repleaded her § 1983 claims against the City Defendants. Thereafter, the City Defendants and Local 1071 moved, under Fed. R. Civ. P. 12 (b) (6), to dismiss the complaint.

By a Decision and Order dated November 23, 1993, the district court granted the motions of the City Defendants and Local 1071 to dismiss Kern's complaint. The district court found that Kern failed to state a claim under § 1983 against the City or the RFD because she was unable to plead any facts indicating that the deprivation of her civil rights was the result of a policy or custom. The district court also found that Kern failed to state a § 1983 claim against Cavuoto because she failed to show "that any alleged wrongful actions attributed to Mr. Cavuoto were committed under color of state law." Finally, the district court dismissed Kern's retaliation claims, finding that she did not have standing to assert that McMenemy had been deprived of his civil rights on account of her complaint against Cavuoto.

The district court also denied Kern's motion to amend her complaint. The court found that the amendment would be futile because her Title VII claims would fail, since neither the City nor Local 1071 was an employer for purposes of Title VII. However, the district court granted Kern leave to move to file an amended complaint setting forth a valid cause of action under Title VII.

On January 19, 1994, Kern again moved to amend her complaint and also moved for reconsideration of the November 23, 1993 order. Her second proposed amended complaint differed from the original complaint in that she did not allege any violations of § 1983 and her sole federal cause of action was under Title VII. By a Decision and Order dated December 1, 1994, the

district court denied Kern's motion to amend her complaint to add a Title VII cause of action against the City Defendants, but found that a hearing was necessary to determine whether Kern could sustain a Title VII cause of action against Local 1071. The district court also denied Kern's motion for reconsideration of the November 23, 1993 Decision and Order.

On August 14, 1995, an evidentiary hearing was held to determine whether Kern could maintain a Title VII claim against Local 1071. The only issue at the hearing was whether Local 1071 had the requisite number of employees to be considered an employer for purposes of Title VII. By a Decision and Order dated October 5, 1994, the district court found that Local 1071 did not have the requisite number of employees to be considered an employer for purposes of Title VII, and thus concluded that Kern could not make out a Title VII cause of action against Local 1071. Accordingly, a final judgment was entered dismissing Kern's complaint.

This appeal followed.

DISCUSSION

I. Section 1983 Claims

Kern first argues that the district court erred in dismissing her § 1983 claim against the City Defendants. We disagree.

A. Claim against Cavuoto

Kern contends that Cavuoto is liable under § 1983 because he violated her right to equal protection when he sexually harassed and assaulted her while she was employed as his secretary. In order

to state a claim under § 1983,[2] a plaintiff must allege a violation of rights secured by the Constitution or laws of the United States, and that such violation was committed by a person acting under the color of state law. See Greenwich Citizens Comm., Inc. v. Counties of Warren and Washington Indus. Dev. Agency, 77 F.3d 26, 29-30 (2d Cir. 1996). Because we have held that sex-based discrimination, including sexual harassment, may be actionable under § 1983 as a violation of equal protection, see, e.g., Annis v. County of Westchester, 36 F.3d 251, 254 (2d Cir. 1994), Kern adequately pleaded a violation of rights secured by the Constitution. The issue in dispute on this appeal is whether Cavuoto was acting under the color of state law when he allegedly deprived Kern of her right to equal protection.

The Supreme Court has stated that "[t]he traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). "It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State." Id. at 49-50. Mere employment by a state or municipality does not automatically mean that a defendant's actions are taken under the color of state law. See Polk County v. Dodson, 454 U.S. 312, 319-2 (1981).

The district court found that Cavuoto was not acting under the color of state law when he harassed and assaulted Kern. The district

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[2] Section 1983, in part, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to be the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

court noted that the complaint makes it clear that, although Cavuoto was a lieutenant in the RFD, he was acting solely in his capacity as Local 1071's president during his contacts with Kern. Kern, nevertheless, argues that Cavuoto was acting under the color of state law because the sexual harassment and assault occurred while Cavuoto was receiving full-time pay and benefits from the City. Kern also claims that the fact that the harassment and assault occurred at Local 1071's offices, where Cavuoto regularly conducted business with city employees, demonstrates that he was acting under the color of state law.

We think that Kern fails to demonstrate that Cavuoto "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West, 487 U.S. at 49 (quoting Classic, 313 U.S. at 326). First, Cavuoto did not hold his position as president of Local 1071 by virtue of any action by the City. Cavuoto was .elected president by union members, irrespective of his position in the RFD. Furthermore, in his capacity as Local 1071's president, Cavuoto performed functions solely for the benefit of the union, not for the benefit of the City. Finally, while Cavuoto may have met with City officials in Local 1071's offices, this does not alter the fact that he did so in his capacity as president of Local 1071 and not as an employee of the RFD. Accordingly, we think that the district court properly dismissed Kern's § 1983 claims against Cavuoto.

B. Claim against the City

Kern claims that the City is liable under § 1983 because it knew of Cavuoto's "womanizing" and failed to stop it. Under Kern's theory, the City's duty to prevent Cavuoto's alleged womanizing arose from its supervisory relationship with Cavuoto. Kern claims that this relationship existed because the City paid Cavuoto a full salary and provided him with benefits while he was president of Local 1071. Even assuming that Cavuoto could be

considered to have been under the City's supervision while he was the president of Local 1071, we think that the district court properly dismissed her § 1983 claim against the City.

We have held that, "[i]n order to establish the liability of a municipality in an action under § 1983 for unconstitutional acts by a municipal employee below the policymaking level, a plaintiff must show that the violation of his constitutional rights resulted from a municipal custom or policy." Gottlieb v. County of Orange, 84 F.3d 511, 518 (2d Cir. 1996). Furthermore, "'circumstantial proof, such as evidence that the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction,'" can support a finding that such a policy exists. Id. (quoting Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991)). The policy or custom need not be memorialized in a specific rule or regulation. Sorlucco v New York City Police Dep't, 971 F.2d 864, 870 (2d Cir. 1992). However, when discriminatory practices of city officials become "persistent and widespread," they may be considered to constitute a municipal custom or usage. Id. at 870-71.

Kern argues that the fact that the City knew of Cavuoto's harassment yet failed to take any affirmative action to prevent Cavuoto from committing further harassment demonstrates a policy of support for the harassment. We think that Kern fails to demonstrate that Cavuoto's harassment and assault occurred as a result of a municipal custom or policy. There is no indication that either the City or Cavuoto's superiors at the RFD knew of Cavuoto's alleged womanizing. The record does not reveal that, prior to Cavuoto's alleged assault, Kern or anyone else ever complained about Cavuoto to the City or to Cavuoto's superiors at the RFD. Moreover, while Kern claims that it was well-known around the Firehouse that Cavuoto was a "pig" who had stated that he hires secretaries "with fast hands and slow lips," these

assertions are wholly conclusory and are not sufficient to defeat a Fed. R. Civ. P. 12 (b) (6) motion to dismiss. See Butler v. Castro, 896 F.2d 698, 700 (2d Cir. 1990) ("A conclusory allegation . . . without evidentiary support or allegations of particularized incidents, does not state a valid claim."). Accordingly, Kern's § 1983 claims against the City properly were dismissed.

C. Claim against RFD and Ippolito

Finally, Kern claims that the RFD and Ippolito are liable under § 1983 for retaliating against McMenemy by denying him a promotion to Captain in the RFD after he reported Cavuoto's harassment and assault to the executive board of Local 1071 and the RFD. We think that the district court properly found that Kern lacks standing to raise a § 1983 claim on the basis of retaliation against McMenemy.

In Warth v. Seldin, 422 U.S. 490 (1975), the Supreme Court stated that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. at 499. In the present case, Kern does not argue that she personally was retaliated against by the RFD or Ippolito. Instead, she attempts to rest her retaliation claim on an alleged violation of McMenemy's civil rights. Because this is precisely what Warth forbids, Kern's retaliation claim properly was dismissed.

II. Title VII claims

Kern argues that the district court erred by failing to allow her to amend her complaint to add Title VII claims against the City and Local 1071. we disagree.

Title VII provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's . . . sex." 42 U.S.C. § 2000e-2 (a). The term "employer" is defined in Title VII as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U. S.C. § 2000e (b). "Title VII is an employment law, available only to employees (or prospective employees) seeking redress for the unlawful employment practices of their employers." Tadros v. Coleman, 717 F. Supp. 996, 1002 (S.D.N.Y. 1989), aff'd, 898 F.2d-10 (2d Cir.), cert. denied, 498 U.S. 869 (1990).

A. Claim against the City

In denying Kern's motion to amend her complaint to add a Title VII cause of action against the City, the district court found that the City was not Kern's employer under Title VII and that "there was no direct connection between the [City's] actions and the claimed harm to [Kern]." While Kern concedes that she was not directly employed by the City, she claims that her job would not exist but for the employment of the firefighters for whom she works and the employment contract between the RFD employees and the City. Kern argues that, because of this connection, the City should be considered her employer for purposes of Title VII.

In support of her argument, Kern points to Spirt v. Teachers Insurance & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), vacated on other grounds, 463 U.S. 1223 (1983). In Spirt, the plaintiff, a female professor at Long Island University ("LIU"), brought a Title VII action against two annuity fund management companies with which LIU had contracted to manage the retirement program for its employees. The plaintiff claimed that the companies violated Title VII by using sex-based mortality tables to calculate the benefits for plan participants. In determining that the companies were liable under Title VII, we stated that "the term "employe" as it is used in Title VII, is sufficiently broad to

encompass any party who significantly affects access of any individual to employment opportunities." Id. at 1063 (quotation marks omitted). We went on to hold that, although the companies did not directly employ the plaintiff, the companies could be considered her "employer" under Title VII because the companies were "closely intertwined" with LIU in light of the fact that LIU delegated to the companies its responsibility to provide retirement benefits. Id. We also noted that the finding of an employment relationship between the companies and the plaintiff was supported by the facts that the plaintiff's participation in the retirement program was mandatory and that LIU shared in the administrative responsibilities of the retirement program. Id.

Spirt, however, is distinguishable from the present case. First, Local 1071, unlike LIU in Spirt, has not delegated any of its employment responsibilities to the City. Furthermore, there is no indication that the City shared any of Local 1071's administrative responsibilities. The City had no authority to hire or fire Kern, to supervise her work or conditions of employment, to determine her rate or method of pay, or to maintain records of her employment. Indeed, Kern fails to allege that her employment at Local 1071 was affected by the City in any way. The only connection that Kern alleges between the City and her employment at Local 1071 is that Local 1071 — and therefore her job — would not exist without a city fire department. However, we think that this relationship is too tenuous to bring the City under the Title VII definition of employer. Therefore, the district court properly denied Kern's motions to amend her complaint to add a Title VII action against the City.

B. Claim against Local 1071

In denying Kern's motion to amend her complaint to add a Title VII cause of action against Local 1071, the district court held that, in order for Local 1071 to be deemed an "employer" within the meaning of Title VII and thus be amenable to a Title VII cause

of action, it must have at least 15 employees. The district court, following an evidentiary hearing, determined that "Local 1071 had only five employees during all times relevant to the complaint." Therefore, the district court determined that it would be futile to allow Kern to amend her complaint to add a Title VII cause of action against Local 1071.

Kern claims that the district court erred in two regards. First, Kern claims that the district court erred in holding that she must prove that Local 1071 employed at least 15 employees during the alleged discrimination in order for her to maintain a Title VII action against Local 1071. According to Kern, because Local 1071 is a labor organization, there is no minimum number of employees requirement to maintain an action under Title VII. In the alternative, Kern claims that the district court erred in determining that Local 1071 employed fewer than 15 employees during the alleged discrimination.

In support of her argument that she need not demonstrate that Local 1071 had 15 employees in order to maintain her Title VII cause of action, Kern points to the EEOC Compliance Manual, Volume II, § 605, Appendix N. The manual explains that both labor organizations and employment agencies with fewer than 15 employees may be covered by Title VII if they regularly deal with employers covered by Title VII. According to Kern, because Local 1071 regularly deals with the City, an employer covered by Title VII, she need not demonstrate that Local 1071 has 15 employees. We know of no federal court that has adopted this interpretation of Title VII. To the contrary, it consistently has been held that, when a plaintiff brings a Title VII action against a union in its capacity as an employer, the plaintiff must demonstrate that the union meets the Title VII definition of "employer." On the other hand, if a plaintiff brings a Title VII action against a union in its capacity as a labor organization, the plaintiff must demonstrate that the union

meets that statutory definition of a "labor organization."[3] See Yerdon v. Henry, No. 95-7604, 1996 WL 438933, at *6 (2d Cir. Aug. 6, 1996) (holding "a labor organization with fewer than fifteen employees cannot be sued as an employer for discrimination under Title VII of the 1964 Civil Rights Act"); Chavero v. Local 241, 787 F.2d 1154, 1155 n.1 (7th Cir. 1986) (holding that "[u]nder Title VII a union can be both an 'employer' and a 'labor organization,'" and noting that "[w]here . . . a plaintiff attempts to hold the union liable in its employer capacity, [the union] must fall under that definition, just as any other employer." (citation omitted)); cf. Herman v. United Bhd. of Carpenters & Joiners, 60 F.3d 1375, 1384 (9th Cir. 1995) (holding that, under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., which contains definitions of "employer" and "labor organization" that are virtually identical to those in Title VII, a plaintiff who sues a union in its capacity as an employer must demonstrate that the union meets the statutory definition of employer); Greenlees v. Eidenmuller Enters., Inc., 32 F.3d 197, 198-99 (5th Cir. 1994) (stating that an employment agency can be classified as either an employer or an employment agency, but, when it is sued in its capacity as an employer, plaintiff must demonstrate that it meets the Title VII definition of employer). In the present case, because Kern is suing Local 1071 in its capacity as her employer, not in its capacity as a labor organization, the district court properly determined that Kern must demonstrate that Local 1071 meets the Title VII definition of an employer. This definition requires that Local 1071 have at least

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[3] 42 U.S.C. § 2000e(d) states, in part:

The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms of conditions of employment . . . .

15 employees. See 42 U.S.C. § 2000e(b). Accordingly, we now turn to the issue of whether the district court erred in determining that Kern failed to demonstrate that Local 1071 had 15 employees.

The district court found that Kern and Local 1071's four officers—the president, the vice president, the secretary, and the treasurer—were the only employees of Local 1071. The district court explicitly rejected Kern's claim that the eight non-officer members of Local 1071's executive board, along with the sergeant-at-arms and three other persons who provided services to Local 1071, were employees for purposes of Title VII. Because Kern's claim necessarily rests on whether the district court erred in determining that the eight non-officer board members were not employees, we only address this issue.

Title VII defines an employee as "an individual employed by an employer." 42 U.S.C. § 2000e (f). Courts have held that directors or board members, while traditionally viewed as employers, can be considered employees depending upon their responsibilities within the business. See, e.g., EEOC v. Johnson & Higgins, Inc., No. 95-6216, 1996 WL 446731, at *12 (2d Cir. Aug. 8, 1996) (holding that directors of an insurance brokerage firm were employees for purposes of the ADEA because each performed traditional employee duties, worked full-time for the firm, and reported to senior members of the firm). In Chavero, the Seventh Circuit stated that, "[a]lthough a director may accept duties that make him also an employee, a director is not an employee because he draws a salary. Rather, the primary consideration is whether an employer-employee relationship exists." 787 F.2d at 1157 (citations omitted). In EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068 (6th Cir. 1982), cert. denied, 464 U.S. 819 (1983), the Sixth Circuit held that persons who were directors and officers could be considered employees under the ADEA because the individuals "performed traditional employee duties" such as "maintaining records, preparing

financial statements, [and] managing the office." Id. at 1070.

In the present case, Kern fails to demonstrate that a traditional employee-employer relationship existed between the eight non-officer board members and Local 1071. The function of the eight non-officer board members was to represent their various constituencies on a board that made and directed the policy of Local 1071 and exercised general oversight over Local 1071's officers. There is no indication that any of the non-officer board members performed any traditional employee duties, such as maintaining records or managing the office. Moreover, there is no indication that the non-officer board members were responsible to anyone but themselves. Thus, the district court properly found that the non-officer members of Local 1071's executive board were not employees for purposes of Title VII. Without these eight members being considered employees, Kern is unable to demonstrate that Local 1071 had 15 employees. Accordingly, the district court correctly found that it would be futile to allow Kern to amend her complaint to add a Title VII action against Local 1071.

CONCLUSION

We have considered Kern's other contentions, and we find them all to be without merit. In view of the foregoing, we affirm the judgment of the district court.

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U.S. DISTRICT COURT
W.D.N.Y. - ROCHESTER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WENDY L. KERN,

Plaintiff,

93-CV-6301T
DECISION and ORDER

v.

CITY OF ROCHESTER, FIRE DEPARTMENT OF THE CITY OF ROCHESTER, POLICE DEPARTMENT OF THE CITY OF ROCHESTER, ROCHESTER FIREFIGHTERS ASSOCIATION, INC., LOCAL 1071 IAFF, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, DANIEL CAVUOTO, Individually and as President of Local 1071 IAFF and as a full time City of Rochester Fire Department, CHARLES D. IPPOLITO, Individually and as a Chief of the City of Rochester Fire Department, LLOYD ELDRIDGE, and UNNAMED CO-CONSPIRATORS,

Defendants.

Plaintiff Wendy Kern filed a complaint against the above-named defendants, alleging that they were liable under 42 United States Code §§ 1983 and 1985 and various state law causes of action as a result of an alleged attack upon the plaintiff by defendant Cavuoto in December of 1992. She then filed a proposed amended complaint, adding a claim for employment discrimination in violation of Title VII. In a decision dated November 23, 1993, I dismissed the original complaint for failure to state a federal claim and her proposed amended complaint for

failure to properly allege a cause of action under Title VII, but allowed the plaintiff leave to move to file an amended complaint to set forth a valid cause of action under Title VII and/or § 1985 (3). Plaintiff then moved for reconsideration of this decision and for leave to file an amended complaint. In a decision and order, I denied her motion to file an amended complaint, her motion for reconsideration and ordered that a hearing be held on the jurisdictional question of whether Local 1071 is an employer which employed at least 15 persons as provided in 42 U.S.C. § 2000e(b).

BACKGROUND

Plaintiff Wendy Kern began her employment as a secretary for Local 1071 in September 1992. Her immediate supervisor in that position was Daniel Cavuoto, the President of Local 1071, whom she allege committed various acts of sexual harassment and discrimination against her during the course of her employment by the union. After the original complaint was filed, all defendants moved to dismiss the action. In a Decision and Order dated November 23, 1993, I dismissed the complaint for failure to state a claim and denied plaintiff leave to file her proposed amended complaint in the action because it was deficient. I granted leave, however, to allow the plaintiff to file an additional proposed amended complaint to remedy the deficiencies in the complaint. Plaintiff's proposed amended complaint differed from the original complaint principally in that it alleged a violation of Title VII as the sole federal cause of action and does not allege violations of either 42 U.S.C. § 1983 or 42 U.S.C. § 1985. Plaintiff moved to submit this proposed complaint as her amended complaint. I held, relying on Greenlees v. Eidenmuller Enterprises, Inc., 32 F.3d 197 (5th Cir. 1994) and Shepherdson v. Local Union No. 401, 823 F.Supp. 1245, 1249 (E.D.Pa. 1993), that because plaintiff was suing Local 1071 in its capacity as an employer it would have to meet the statutory definition of employer set forth in Title VII.

Both the plaintiff and the defendant Local 1071 submitted detailed proffers of evidence, affidavits, documentary exhibits, and memoranda of law concerning the issue.

DISCUSSION

1. Plaintiff's Title VII Claims

In my previous decision, I held that the plaintiff's attempts to state a cause of action under Title VII was deficient because she had not alleged that her employer (Rochester Firefighters Association Inc., Local 1071, International Association of Fire Fighters), employed more than fifteen persons, which is a statutory prerequisite to bringing an action under Title VII. Both sides submitted oral proffers of evidence and numerous documentary exhibits at a hearing on the jurisdictional issue on August 28, 1995.

The plaintiff is charged with the burden of proving the Court's jurisdiction. Shepherdson v. Local 401, 823 F.Supp. 1245 (E.D. Pa. 1993). As I discussed in my previous decision, because the plaintiff is suing Local 1071 in its capacity as an employer, she must demonstrate that Local 1071 is an employer within the meaning of Title VII. Pursuant to 42 U.S.C. § 2000e-(b), an employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person." The "current year" in the statute refers to the year in which the alleged discrimination occurred. Dumas v. Town of Mount Vernon, 612 F.2d 974 (5th Cir. 1980). The twenty week statutory minimum is satisfied by either employment for twenty consecutive weeks or any twenty weeks within a calendar year. See Shepherdson, 823 F. Supp. at 1252. Finally, both part-time and full-time employees count toward meeting the jurisdictional minimum. See, e.g., Thurber v. Jack Reilly's, Inc., 717 F.2d 633 (lst Cir. 1983), cert.

denied, 466 U.S. 904 (1984).

Prior to the hearing, both sides stipulated that Wendy Kern was an employee within the meaning of the Act. This is clearly supported by the evidence submitted, and I accept this as fact. The parties disagree, however, concerning the other persons that the plaintiff claims are employees of the union. These persons break down into three main groups:

1) Union Officers — the President, Vice-President, Secretary, and Treasurer of Local 1071;

2) Other Executive Board Members — Eight elected officers of the executive board representing various constituencies of the membership, plus the Sergeant-at-Arms (who is elected but is not, technically, an officer of the Executive Board);

3) Persons Providing Other Services to the Union – Three persons who have provided services to the Union in non-elected capacities.

Plaintiff claims that all members of each of the three groups should be counted as employees. She thus claims that the total number of Local 1071 employees is seventeen. I address each group in turn:

a. Union Officers

Local 1071 elects one person to each position of President, Vice-President, Secretary, and Treasurer. The President differs from all other elected union positions in that he is on full release time from employment as a fire fighter. In other words, although the union president is paid his full salary by the Rochester Fire Department, he is not required to assume the regular task of fighting fires. Instead, his full time job is union business. He is still paid his full city salary, and receives an additional $7,500.00 per year from the Union. The Vice-President, Secretary, and Treasurer

of the Union do not have the benefit of release time, and thus must maintain their regular full-time schedule as firefighters. However, they receive $5,700 per year in compensation from Local 1071 for services to the Union. The amounts of compensation are established in Article V, Section 4 of Local 1071's By-Laws and are termed "salaries" by the Union.

The plaintiff claims that the four union officers are employees of Local 1071, contending that their work is "traditional employee work" and citing the Sixth Circuit's decision in EEOC v. First Catholic Slovak Ladies Association, 694 F.2d 1068, 1070 (6th Cir. 1982) for this principle. Slovak Ladies Association teaches that the label which an organization assigns to a particular position or whether that position is chosen by an election does not determine whether that person is an employee within the meaning of Title VII. The relevant determination is whether the duties performed by the officers are primarily "employee" or "employer" tasks. Plaintiff contends that the four Union officers are employees because they perform traditional employee duties.

The defendants contend that they are not employees within the meaning of Title VII, relying principally on Chavero v. Local 241, 787 F.2d 1154 (7th Cir. 1986). In Chavero, the Seventh Circuit held, in a decision analogous to this case, that the officials of the union local could not be considered employees because the Board "reports to no one other than itself" and that a finding that the Board members were employees would distort "traditional concepts of employment relationships." Chavero, 787 F.2d at 1157.

While it is true that the union officers are elected, a factor which favors a finding that they are not employees, there are significant indications that the four union officers are employees. First, each of the four union officers received bi-weekly payments from the union, from which were deducted payroll taxes and Social Security and Medicare payments. Similarly, the union submitted

yearly reports of the salaries paid and the taxes withheld on a standard IRS W-2 form.

The defendants' attorney contends that the union withheld taxes in this manner because the union's accountant could only classify the union officials as "employees" or "independent contractors" for tax purposes. Because the four officials did not fit the definition of independent contractors, the accountant was required to classify them as employees for tax purposes. While the accountant's determination is not conclusive on this issue, it does indicate that the four union officers were considered employees. More significant to the analysis is the By-Laws of Local 1071, which specify duties to be performed by each of the four officers. According to Article I, Section 1, for example, the Union President is required to represent Local 1071 as a delegate to the International and State IAFF conventions as well as to the Rochester and Vicinity Labor Council, countersign all checks drawn by the treasurer, control the printing of all organizational literature and "to perform all other duties as this Union may direct from time to time." The Vice-President, pursuant to Article I, Section 2, is required to be Chairman of the Executive Board and a delegate to the Rochester and Vicinity Labor Council. The Treasurer, pursuant to Article I, Section 3, is required to essentially manage all the funds of the Union, maintain receipts, and issue quarterly reports. Finally, the Secretary, pursuant to Article I, Section 4, is required to "keep an accurate record of the proceedings of all meetings, read all communications, and conduct all correspondence."

In examining the various types of duties performed by the four Local 1071 officers, combined with the amount of their salary, and the fact that each is treated as an employee for tax purposes by the Union, I agree with the plaintiff that the four executive officers of the Union are employees within the meaning of the statute. The tasks performed by these four persons go

beyond the general supervisory tasks normally expected of directors and in fact conduct the day-to-day business.of the Union. The plaintiff has also demonstrated that the four officers were responsible to conduct business frequently enough to constitute twenty working weeks within the year prior to the alleged discrimination in this case. For example, the Union provides cellular phones for the persons designated as President, Vice-President, Secretary, and Treasurer and has published those numbers to the membership for use when "it is imperative to reach a paid member of the Executive Board." See Exhibit 13. I therefore find that the President, Vice-President, Secretary, and Treasurer of Local 1071 are "employees" within the meaning of Title VII and should be counted in determining the 15 employee minimum required by 42 U.S.C. § 2000e-(b)

b. Non-Officer Board Members

In contrast to the four officers, the eight other board members and the Sergeant-at-Arms have significantly different job descriptions with respect to compensation, duties, and time required. According to the By-Laws, each of the non-officer board members represent various constituencies of the Union and vote at board meetings. In return for their service to the Local, they receive approximately $150 per year, paid quarterly, according to Article V, Section 4B of the Local By-Laws of Local 1071. Furthermore, the Battalion Chief, Captain, and Lieutenant Board Members have no additional set responsibilities, while the additional duties of the five trustees are to attend meetings, audit the books of the Treasurer, conduct the elections, and submit a report to the International. The duties of the Sergeant-at-Arms are limited essentially to maintaining order and recording meeting attendance.

Although the plaintiff contends that the non-officer members of the Local 1071 board are all employees of Local 1071, the type of work they performed and the range of their responsibilities

strongly indicate that they are not employees. In contrast to the four union officers, the non-officer board members do not conduct the day-to-day activities of Local 1071, but rather make and direct policy at the meetings and exercise general oversight over the four union officers. While the President, Vice-President, Secretary, and Treasurer are expected to be on call to answer questions and conduct union business on a regular basis (and on infrequent occasions a non-officer board member has performed work on behalf of the Union,) there is no indication that similar duties are regularly required of the non-officer members of the board so as to make them employees for Title VII purposes.

The Seventh Circuit's decision in Chavero and the Sixth Circuit's decision in Slovak Ladies Association both support this conclusion. In Chavero, the court held that "[a]though a director may accept duties that make him also an employee . . . , a director is not an employee because he draws a salary." Chavero, 787 F.2d at 1157 (citing Slovak Ladies Association, 694 F.2d at 1070). Slovak Ladies Association also expresses this principle, although the court concluded that the directors were employees under the particular facts of the case. In that case, the directors were held to be employees because they were also salaried officers who maintained financial records and managed the union office. In this case, I have already found that those board members who are also salaried officers are employees for Title VII purposes. I find, however, that the eight other board members and the Sergeant-at-Arms are not employees for Title VII purposes because they are no more than minimally-paid directors of the Union with very limited responsibilities. They simply do not fit the traditional definition of employee.

c. Other Alleged Employees

Kern also alleges that Larry Belkin, John Parrinello, and Sam Corridi are employees of the Union. Larry Belkin had been contracted as a fund-raiser for the Union. John Parrinello was

retained counsel for the Union for approximately fifteen years. Sam Corridi is a retired firefighter paid by the Union to videotape retirement parties.

Kern simply has not demonstrated that any of these three persons are employees. In fact, several exhibits submitted by the plaintiff herself contradict any conclusion that Larry Belkin is an employee. Plaintiff's Exhibit 24, for example, includes a contract between Daniel Cavuoto and Larry Belkin entered into on January 6, 1992. This contract sets forth an agreement by which Belkin's company, Fundraising Services of New York, Inc., would publish a fire prevention booklet in which ad space would be sold. The booklets would then be sold through phone solicitation by Fundraising Services and the gross receipts would be split, with 25% to Local 1071 and 75% to Fundraising Services, Inc. In addition, Fundraising Services guaranteed Local 1071 at least a $200,000 profit over the five year period of the agreement. Finally, Fundraising Services, Inc. maintained its own offices and hired its own personnel to sell ad space and solicit orders for the booklet.

The contract between Local 1071 and Larry Belkin is simply not an employment contract. It is a contract between the union and an independent contractor for fundraising services. Fundraising Services, Inc. guaranteed Local 1071 a profit from the contract, which plainly contradicts the essence of an employment contract, by which an employer offers pay in return for personal services. There is absolutely no indication that Larry Belkin served the Union in any capacity even remotely resembling an employment relationship. In short, plaintiff's contention that Larry Belkin was an employee of Local 1071 is plainly contradicted by the terms of the agreement between the parties.

Similarly, plaintiff's contention that John Parrinello was an employee of the union is completely unsupported by the facts. John Parrinello has appeared before this Court on many occasions, maintains his own office in partnership with another attorney, and

appears from the Union records to have been paid by the Union on an hourly basis. Plaintiff's contention that Redmond & Parrinello had their own line in the Union budget and that former union president Daniel Cavuoto spoke frequently with John Parrinello on the phone simply does not support her conclusion that John Parrinello is therefore an employee of the Union. Such facts are equally consistent with Parrinello being an independent attorney contracting with Local 1071 to provide legal services. I find that plaintiff has not demonstrated that John Parrinello was an employee of Local 1071.

Finally, plaintiff contends that Michael Corridi was an employee of the Union. Corridi is apparently a retired fire-fighter who tapes various retirement parties and other Union events, for which he is reimbursed for the cost of video tape and for the use of his equipment. As with Parrinello and Belkin, however, the plaintiff has not demonstrated the necessary control over Corridi which is the earmark of an employment relationship. Based upon my review of the evidence, I conclude that Corridi is an independent contractor who could accept or reject a taping job as he chose. Similarly, if there were no retirement parties to be taped, Local 1071 had no obligation to pay Corridi on a regular business. Further, it appears that Corridi provided his own equipment and charged a standard amount (approximately $50) for each event. In this case, the facts clearly demonstrate that Corridi is not an employee but an independent contractor. Thus, I find that plaintiff has failed to demonstrate that Corridi was an employee of the Union.

2. Single Entity Theory

Plaintiff also claims that Local 1071 meets the 15 employee test because the employees of the parent union, the International Association of Fire Fighters (IAFF) should be counted under a "single entity theory." Defendant Local 1071 does not contest that if employees of the IAFF were counted, the statutory

requirement of fifteen employees would be met. Local 1071 argues, however, that application of the single entity theory in this case is inappropriate because the required control by the IAFF over Local 1071 does not exist.

In order for the single entity theory to apply to Local 1071, more than a connection or relationship between the two entities must be demonstrated. Instead, Kern must demonstrate that the Local was an agent controlled by the IAFF[1] or a single entity with the IAFF. Several circuits have adopted a four-part analysis to determine whether two distinct entities constitute a single employing entity. This test considers "1) inter-relation of operations; 2) common management; 3) centralized control of labor relations; and 4) common ownership or financial control." Shepherdson v. Local 401,, 823 F.Supp. at 1250 (citing Childs v. Local 18. International Brotherhood of Electrical Workers, 719 F.2d 1379 (9th Cir. 1983)).

Examining plaintiff's proof in light of this test, I find that the connections between Local 1071 and the IAFF do not establish an agency relationship. It is undisputed that Local 1071 is subordinate to the IAFF pursuant to the charter and constitution of the IAFF. Nevertheless, I find that the connections between the two entities were insufficient to demonstrate that Local 1071 is an agent of the IAFF.

Kern alleges facts which she claims support this conclusion. For example, on Page 14 of the plaintiff's reply memorandum of law (Docket Item Number 80), she claims that Local 1071 should be considered an instrumentality of the IAFF because the

[1] If Kern were able to demonstrate that Local 1071 were an agent of the IAFF, however, the Title VII claim could only proceed against the IAFF, and not Local 1071. The Second Circuit has recently held that Title VII does not permit liability for agents of employers. See Tomka v. The Seiler Corporation, Dkt. No. 94-7975 (2d Cir., September 27, 1995). Nevertheless, in light of my determination that Local 1071 is not an agent of the IAFF, neither party is subject to Title VII liability.

International failed to act to censure Lt. Cavuoto when Kern made her allegations. Oddly, Kern is attempting to allege control and domination of the Local because the IAFF did not step in and attempt to micro-manage the handling of Kern's claim. The facts which Kern alleges, however, appear to lead to the opposite conclusion: that the IAFF simply did not involve itself in the day-to-day management of Local 1071.

Kern also contends that Local 1071 is dominated based upon IAFF's alleged actions in impounding union election results in 1994 and financial records in 1994 and 1995. Even setting aside the issue of whether the IAFF's actions in 1994 and 1995 could establish domination and control of Local 1071 in 1992, the actions taken by the International with respect to both the elections and financial records appear to be within the International's constitutional power based upon Article XIII, Sections 9 (Audits and Financial Reports), 11 (Nomination and Elections of Officers), and 22 (Assistance of International on Disputes and Grievances).

More importantly, however, the plaintiff has failed to demonstrate any consistent domination of Local 1071 by the IAFF. Kern has not demonstrated an inter-relation of operations to any significant degree. According to the IAFF's constitution, Local 1071 exists as an autonomous entity under the IAFF Constitution affiliated with and chartered by the IAFF. While Local 1071 is required to follow rules set forth in the International's Constitution and By-Laws, it is free to adopt its own procedures in all other respects. Furthermore, plaintiff has failed to demonstrate any control by the International over Local 1071's funds, any common management personnel shared between the International, nor any control over the Local's collective bargaining. Consequently, I conclude that the plaintiff has not met her burden of demonstrating that Local 1071 and the IAFF are a single entity or that Local 1071 is an agent of the IAFF. See Childs v. Local 18, IBEW, 719 F.2d 1379 (9th Cir. 1983).

CONCLUSION

In light of my findings that Local 1071 had only five employees during all times relevant to the complaint and that Local 1071 is neither an agent of nor a single entity with the International Association of Fire Fighters, I hold that Local 1071 is not an employer within the meaning of Title VII (42 U.S.C. § 2000e(b). Consequently, I dismiss the Title VII action against Local 1071 and Daniel Cavuoto.[2] As plaintiffs remaining claims are pendent state-law claims which are currently being pursued in New York State Supreme Court, I exercise my discretion to dismiss them without prejudice. United Mine Workers v. Gibbs, 383 U.S. 715 (1966); 28 U.S.C. § 1367(c)(3). Plaintiff's complaint is dismissed in its entirety.

ALL OF THE ABOVE IS SO ORDERED.

s/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
October 5, 1995

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[2] The Title VII claim against Cavuoto would be dismissed in any event due to the Second Circuit's holding that agents of employers cannot be held personally liable for violations of Title VII. Tomka v. The Seiler Corporation, Dkt. No. 94-7975 (2d Cir., September 27, 1995).

FILED
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U.S. DISTRICT COURT
W.D.N.Y. - ROCHESTER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WENDY L. KERN,

Plaintiff,

93-CV-6301T
DECISION and ORDER

v.

CITY OF ROCHESTER, FIRE DEPARTMENT OF THE CITY OF ROCHESTER, POLICE DEPARTMENT OF THE CITY OF ROCHESTER, ROCHESTER FIREFIGHTERS ASSOCIATION, INC., LOCAL 1071 IAFF, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, DANIEL CAVUOTO, Individually and as President of Local 1071 IAFF and as a full time City of Rochester Fire Department, CHARLES D. IPPOLITO, Individually and as a Chief of the City of Rochester Fire Department, LLOYD ELDRIDGE, and UNNAMED CO-CONSPIRATORS,

Defendants.

Plaintiff Wendy Kern filed a complaint against the above-named defendants, alleging that they were liable under 42 United States Code §§ 1983 and 1985 and various state law causes of action as a result of an alleged attack upon the plaintiff by defendant Cavuoto in December of 1992. She then filed a proposed amended complaint, adding a claim for employment discrimination in violation of Title VII. In a decision dated November 23, 1993, I dismissed the original complaint for failure to state a federal claim and her proposed amended complaint for

failure to properly allege a cause of action under Title VII, but allowed the plaintiff leave to move to file an amended complaint to set forth a valid cause of action under Title VII and/or § 1985 (3). Plaintiff has since moved for reconsideration of this decision and for leave to file an amended complaint in this action. She has also moved to supplement the record. For the reasons stated below, I deny her motion to file an amended complaint, her motion for reconsideration, and her motion to supplement the record. A hearing will be held on the question of whether Local 1071 is an employer which employed at least 15 persons as provided in 42 U.S.C. § 2000e(b).

BACKGROUND

Plaintiff Wendy Kern began her employment as a secretary for Local 1071 in September 1992. Her immediate supervisor in that position was Daniel Cavuoto, the President of Local 1071, whom she alleged committed various acts of sexual harassment and discrimination against her during the course of her employment by the union. She also alleged that Rochester Fire Department Lt. John McMenemy (the Treasurer of Local 1071) was denied a promotion to Captain because he processed Ms. Kern's internal union complaint. She alleged that members of the Rochester Police Department investigating her criminal charges were friends of Mr. Cavuoto and that information concerning these charges was given to him before first informing Ms. Kern, as she had been promised. Finally, she alleged that she was terminated from employment in retaliation for her making complaints and filing this lawsuit.

After the original complaint was filed, all defendants moved to dismiss the action. In a Decision and Order dated November 23, 1993, I dismissed the complaint for failure to state a claim and denied plaintiff leave to file her proposed amended complaint in the action because it was deficient. I granted leave, however, to allow the plaintiff to file an additional proposed amended complaint to remedy the deficiencies in the complaint.

Plaintiff's current proposed amended complaint differs from the original complaint principally in that it alleges a violation of Title VII as the sole federal cause of action and does not allege violations of either 42 U.S.C. § 1983 or 42 U.S.C. § 1985. Plaintiff now moves to submit this proposed complaint as her amended complaint and for reconsideration of this Court's November 23, 1993 decision in light of the Second Circuit's decision in Spirt v. Teachers Insurance and Annuity Association, 691 F.2d 1054 (2d Cir. 1982), claiming that this authority was overlooked by both this Court and counsel.

DISCUSSION

1. Plaintiff's Title VII Claims

In my previous decision, I held that the plaintiff's attempts to state a cause of action under Title VII was improper because she had not alleged that her employer (Rochester Firefighters Association Inc., Local 1071, International Association of Fire Fighters), employed more than fifteen persons, which is a statutory prerequisite to bringing an action under Title VII.

Kern argues that she is not required to allege that Local 1071 employed more than 15 persons because it is a union, and is not subject to this employment requirement. In support of her argument, she has submitted several EEOC decisions which take the position that there is jurisdiction as an employer over any labor organization under Title VII, whether or not that labor organization employs more than 15 persons. She argues that the position of the EEOC on this matter should be given great weight and that the court should not substitute its judgment for that of the agency so long as the view of the EEOC is rational. She cites Chemical Manufacturers Ass'n v. National Resource Defense Counsel, 470 U.S. 116, 125 (1985) in support of this position.

The United States Court of Appeals for the Fifth Circuit addressed a closely analogous issue in its recent decision in

Greenlees v. Eidenmuller Enterprises, Inc., 32 F.3d 197 (5th Cir. 1994). Plaintiff was employed by defendant, which operated as an employment agency. She brought suit under Title VII, alleging discrimination as the basis for her termination. The District Court dismissed her complaint for lack of jurisdiction. The Fifth Circuit affirmed, holding that when an employment agency is sued in its capacity as an employer, the plaintiff must demonstrate that the agency meets the statutory definition of "employer", which included the requirement that it employed more than 15 persons. The Court relied on several decisions in union-employer cases to support its conclusion. Id. at 199 (citing cases).

Significantly, the plaintiff in Greenlees raised an argument almost identical to that advanced here by Kern: that the District Court erred in refusing to defer to the EEOC's interpretation of its guidelines, which provide that employment agencies are covered by Title VII as employers even when they do not have a sufficient number of employees to meet the statutory definition. The Court rejected this argument on two grounds. First, the Court held that the statute was not ambiguous and thus did not warrant deference to agency interpretation. Second, it held that the usual deference given to agency interpretations is limited when applied to the EEOC because Congress did not give EEOC the authority to promulgate rules or regulations under Title VII. The Court thus refused to defer to EEOC interpretation because the plain language of the statute and the weight of precedent contradicted the EEOC's position.

The rationale of Greenlees is squarely applicable to this case. Kern is suing Local 1071 in its capacity as an employer, not in its capacity as a union. Therefore, Kern must demonstrate that Local 1071 meets the statutory definition of "employer".

Kern does not allege in her proposed amended complaint that Local 1071 employs more than 15 persons. She merely alleges generally that Local 1071 is "an employer within the meaning of

the laws against discrimination/retaliation". Ms. Kern alleges in an affidavit accompanying her proposed amended complaint, however, that Local 1071 had more than 15 employees at the time of the alleged discrimination and listed them. This list includes the President, Vice-President, Secretary, and Treasurer of Local 1071, nine other members of Local 1071's executive board, Kern, a retired firefighter who occasionally taped retirement parties (Sam Corridi), a person who acted as a fund raiser for Local 1071 (Larry Belkin), and Local 1071's attorney (John Parrinello), for a total of seventeen.

These general allegations are specifically contradicted by an affidavit submitted by Richard Mattice, Secretary of Local 1071. In that affidavit, he contends that only Daniel Cavuoto and Kern were employees within the meaning of 42 U.S.C. § 2000e(b) and that the others listed were part-time officers of the union, members of the executive board of the union, or independent contractors. He alleges that none of the persons listed met the statutory standard of being "employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." Therefore a hearing is required to resolve the questions of fact presented as to whether or not these persons are employees of Local 1071 within the meaning of the statute. Contrary to plaintiff's counsel's suggestion, this is not a jury question. See Mortensen v. First Federal Savings and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977) (District Court has power to weigh evidence and resolve questions of fact concerning basis of subject matter jurisdiction, and no presumptive truthfulness attaches to plaintiff's allegations.); Shepherdson v. Local Union No. 401, 823 F.Supp. 1245, 1249 (E.D.Pa. 1993) (District Court has power to resolve issue of whether employer has fifteen members).

Whether this Court has subject matter jurisdiction over the pendant state law causes of action will depend on the determination of this issue. United Mine Workers v. Gibbs, 383 U.S. 715 (1966);

28 U.S.C. § 1367(c)(3).[1] Plaintiff's Motion for Reconsideration Plaintiff has also moved for reconsideration of my prior decision based upon the Second Circuit's decision in Spirt v. Teachers Ins. and Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), which she claims was overlooked by both this Court and counsel. The decision is, however, inapplicable to this case. In Spirt, a tenured professor at Long Island University ("LIU") sued two annuity funds that LIU had contracted to manage the retirement program for its employees. She claimed that they violated Title VII by using sex-based mortality tables to calculate the benefits for each of the plan participants. The District Court agreed and granted summary judgment. The Second Circuit, among other issues in the case, considered whether the funds could be considered "employers" within the meaning of Title VII. The Court held that the funds should be considered employers, even though they did not directly employ the plaintiff because the funds, "which exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities, . . . that they must be deemed an employer for purposes of Title VII." Id. at 1063.

The facts in Spirt differ significantly from this case. Most importantly, Spirt involved actions by the defendants which directly affected the plaintiff. In the present case, Kern has advanced the theory that the City of Rochester should be accountable to her because its agents had allegedly punished another person (Lt. McMenemy) for taking an internal union complaint. Kern does not allege that any adverse employment action taken by the City was taken against her. Significantly, Spirt does not change the basic principle of standing, repeated in Warth

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[1] Plaintiff has argued in her briefs that "the law of the case" is that her state claims would be sufficient, should this Court recognize a federal claim. Although I do not recognize a federal claim in this action, I must state that neither this decision nor any prior decision is this case has considered viability of any of the state law claims pleaded by the plaintiff.

v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975), that plaintiffs "cannot rest [their] claim[s] to relief on the legal rights or interests of third-parties." Plaintiff has demonstrated no case where, as here, a plaintiff was allowed to recover or pursue a claim under Title VII where there was no direct connection between the defendant's actions and the claimed harm to the plaintiff. Moreover, in Spirt, LIU had contracted with the defendants to administer the annuity fund, thus delegating its responsibility to provide retirement benefits. By contrast, the City is not alleged to have been delegated any responsibilities by the Union relative to Kern or even that the City knew that Kern was employed by Local 1071. Finally, the Second Circuit held that it was relevant that participation in the funds was mandatory for all tenured faculty and that LIU shared administrative responsibilities over the funds. Here, the City is not alleged to have shared any administrative responsibility relative to Ms. Kern with Local 1071. She is not alleged to have been on the City's payroll, nor on their retirement plan, nor in any capacity in their employment records. The rationale in Spirt is limited to situations in which there is some reasonable nexus between the defendant and the plaintiff. Kern has alleged no connection between the defendants' alleged actions against Lt. McMenemy and any actionable wrong against her. Plaintiff's motion for reconsideration is denied.

3. Plaintiff's Motion to Supplement Record

While the Plaintiff's motions outlined above were pending, plaintiff made a motion to supplement the record in this case. This motion sought to include three items in the record of this case: (1) A copy of Lt. McMenemy's 50-h hearing transcript, (2) A copy of the Xerox Corporation's sexual harassment policy handbook, and (3) A copy of a newspaper article discussing alleged improprieties between former Rochester Fire Chief Ippolito and a uniform company. This motion is denied because all of these documents are irrelevant to the issues presented in this case. See also Federal

Rule of Evidence 403 ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues. . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Accordingly, her motion to supplement the record is denied.

4. Eldridge's and Local 1071's Requests for Fees

As part of their responses to plaintiffs motions, defendants Eldridge and Local 1071 have both requested costs of their motions pursuant to 42 U.S.C. § 2000e-5(k). They have not provided any details about the costs incurred in responding to this motion. After considering these requests, I deny their application for fees.

ALL OF THE ABOVE IS SO ORDERED.

s/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
December 1 , 1994

DEC 3 1994

6:93-cv-06301

John R. Parrinello, Esq.
Redmond & Parrinello
400 Executive Office Bldg.
Rochester, NY 14614

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U.S. DISTRICT COURT
W.D.N.Y. - ROCHESTER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WENDY L. KERN,

Plaintiff,

93-CV-6301T
DECISION and ORDER

v.

CITY OF ROCHESTER, FIRE DEPARTMENT OF THE CITY OF ROCHESTER, POLICE DEPARTMENT OF THE CITY OF ROCHESTER, ROCHESTER FIREFIGHTERS ASSOCIATION, INC., LOCAL 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, DANIEL CAVUOTO, Individually and as President of Local 1071 IAFF and as a full time City of Rochester Fire Department, CHARLES D. IPPOLITO, Individually and as a Chief of the City of Rochester Fire Department, LLOYD ELDRIDGE, and UNNAMED CO-CONSPIRATORS,

Defendants.

Plaintiff filed this action on June 28, 1993, alleging violations of 42 U.S.C. §§ 1983, 1985(3), and 1986 and state law provisions arising from incidents which occurred while she was employed as a secretary by Rochester Firefighters Association, Inc., Local 1071, IAFF ("Local 1071"). All named defendants have moved to dismiss the action under Federal Rule of Civil Procedure 12(b). Plaintiff opposes these motions and moves to amend her complaint under Federal Rule of Civil Procedure 15 to allege a claim under the Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e, et seq. For

the reasons set forth below, I grant defendants' motions and deny the cross-motion with leave for plaintiff to renew her motion to file an amended complaint which comports with this decision.

BACKGROUND

Plaintiff Wendy Kern began her employment as a secretary for Local 1071 in September, 1992. Her immediate supervisor in that position was Daniel Cavuoto, the President of Local 1071, whom she alleges committed various acts of sexual harassment, and discrimination during the course of her employment. She specifically alleges that Mr. Cavuoto sexually assaulted her on December 30, 1992. She also alleges that, in retaliation for taking Ms. Kern's internal union complaint regarding this harassment, Rochester Fire Department Lt. John McMenemy (the Treasurer of Local 1071) was denied a promotion to Captain. Finally, she alleges that members of the Rochester Police Department investigating her criminal charges were friends of Mr. Cavuoto and that information of these charges was given to Mr. Cavuoto without first informing Ms. Kern, as she had been promised.

MOTION TO DISMISS OF THE CITY OF ROCHESTER, THE ROCHESTER FIRE DEPARTMENT, THE ROCHESTER POLICE DEPARTMENT, FIRE CHIEF CHARLES IPPOLITO AND DANIEL CAVUOTO

1. Section 1983 Claim

The City of Rochester (the "City"), Rochester Police Department ("RPD"), and Rochester Fire Department ("RFD") collectively move to dismiss the 42 U.S.C. § 1983 claim on the ground that Ms. Kern fails to state a claim against them. They correctly maintain that the § 1983 claim should be dismissed as to the City and its municipal agencies because the City cannot be held liable merely because it employs a wrongdoer. Municipalities and, by extension, municipal agencies such as RPD and RFD may be held liable under § 1983 only when the deprivation of rights is

caused pursuant to "a policy statement, ordinance, regulation, or decision promulgated by that body's officers." Monell v. Department of Social Services, 436 U.S. 658, 690 (1978). The Plaintiff alleges no facts even to suggest that any of the alleged deprivations of her civil rights were pursuant to any policy or custom of the RPD, RFD, or the City. The claims against the City, RPD, and RFD should be dismissed on that basis.

But more importantly, even a liberal reading of the factual allegations of the complaint fails to demonstrate an essential element of a § 1983 claim: that any alleged wrongful actions attributed to Mr. Cavuoto were committed under color of state law. "Color of state law" is an essential element of the § 1983 claim. This requirement is satisfied when a defendant "act[s] in his official capacity or while exercising his responsibilities pursuant to state law." West v. Atkins, 487 U.S. 42, 50, 108 S.Ct. 2250, 2255 (1988). In determining whether the actions taken by Mr. Cavuoto were under color of state law, the Court must discern the source of Mr. Cavuoto's authority and whether such authority devolved from a grant of power by the state. Temple v. Albert, 719 F.Supp. 265, 267 (S.D.N.Y. 1989). Mere employment by a state or municipality, although relevant to determining whether a defendant's actions are under color of state law, does not conclusively establish state action. Polk County v. Dodson, 454 U.S. 312, 321, 102 S.Ct. 445, 451 (1981) (Public Defenders, although state employees, do not act under color of state law when representing their clients because the state lacks authority over their actions.)

The alleged facts, even when viewed in the light most favorable to Plaintiff, make clear that Mr. Cavuoto was not acting under color of state law. Ms. Kern does not allege that she was an employee of the City at any time (her complaint makes clear that she was employed at all times by Local 1071), nor does she allege facts that Mr. Cavuoto used his official authority as a Rochester Firefighter to commit any of the alleged unlawful acts.

The allegations in the complaint make clear that, although Mr. Cavuoto was a lieutenant in the RFD, he was acting solely in his capacity as Local 1071 union president in his contacts with Ms. Kern and not pursuant to any official duties as a firefighter with the RFD. Therefore, because Ms. Kern fails to allege that Mr. Cavuoto was acting pursuant to any official duties or responsibilities under state law, i.e. as an active duty firefighter, the § 1983 claim against Mr. Cavuoto must be dismissed.

Plaintiff also claims that her civil rights were violated when RFD failed to promote Lt. John McMenemy in retaliation for taking Ms. Kern's internal complaint. Even if the failure to promote Lt. McMenemy violated § 1983, however, Ms. Kern lacks standing to assert such a violation. An allegation of injury to Lt. McMenemy does not state a cause for the violation of Ms. Kern's civil rights. Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third-parties.) Put simply, it was Lt. McMenemy's, not Ms. Kern's, civil rights that may have been violated in these circumstances.

Plaintiff also claims that her civil rights were violated because the individuals who investigated her internal complaint were friends of Mr. Cavuoto and that they improperly leaked the police report to him. Again, Ms. Kern fails to allege the critical requirement that the leak was pursuant to any official promulgation or policy of the City or its agencies. Monell, 436 U.S. at 690. Thus, she fails to state a claim for a civil rights violation on that basis as well. Ms. Kern simply fails to indicate how the act of employing persons who knew Mr. Cavuoto and were ordered to investigate the case or the subsequent alleged leaking of that information to Mr. Cavuoto could violate her civil rights.

Finally, the only unlawful action that plaintiff attributes to Fire Chief Ippolito was his alleged failure to promote Lt. McMenemy in

retaliation for his taking Ms. Kern's internal complaint. Again, Ms. Kern has no standing to claim relief for alleged wrongs that may have been committed against Lt. McMenemy. Therefore, inasmuch as Ms. Kern alleges no personal, redressable harm as a result of Chief Ippolito's alleged action, her claim on this ground must be dismissed.

2. The Conspiracy Claim Pursuant to § 1985(3)

Ms. Kern also alleges that Defendants Ippolito, Cavuoto, Eldridge and other unknown persons have conspired to deprive her of her civil rights in violation of 42 U.S.C. § 1985(3). She alleges that the defendants "interfered with plaintiff's right to complain about defendant Cavuoto's unlawful conduct, her right to due process of law and equal protection of the laws."

In order to state a conspiracy claim under § 1985(3), the complaint must contain more than conclusory allegations of conspiracy. "The Plaintiff must make some effort to provide some 'details of time and place and the alleged effect of the conspiracy.'" Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir. 1993) (quoting 2A Moore's Federal Practice § 8.17[6] (2d Ed. 1992)). Vague or conclusory allegations that the defendants have engaged in a conspiracy to deprive Plaintiff of constitutional rights are properly dismissed. Id. Plaintiff makes only a conclusory allegation of conspiracy, providing no details about how the seven defendants named acted with any concert of purpose at all, much less with the purpose "to deprive plaintiff of and/or interfere with her rights."

The Supreme Court's most recent discussion of § 1985(3) was in Bray v. Alexandria Women's Health Clinic, --- U.S. ---, 113 S.Ct. 753 (1993). In reaching its conclusion, the Supreme Court summarized the precedent under § 1985(3) as requiring a showing that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action." Id.

at 758 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)). Assuming that women are a class that falls under the scope of § 1985(3) (a question that the Supreme Court left open in Bray), Bray makes clear that the infringement of the civil rights must be "aimed at" by the conspiracy — it must be "a conscious objective of the enterprise." Id. at 762. Although Ms. Kern pleads that Mr. Cavuoto deprived her of her civil rights, she makes no more than a conclusory allegation that there was a conspiracy to deprive her of her rights. Accordingly, I grant the motion by defendants City, RPD, RFD, Mr. Cavuoto, and Chief Ippolito to dismiss the § 1985(3) claims against them.

MOTION BY LLOYD ELDRIDGE TO DISMISS

Plaintiff alleges two federal claims against Mr. Lloyd Eldridge. The first of the claims names Mr. Eldridge as a co-conspirator in the deprivation of Ms. Kern's civil rights in violation of § 1985(3). The second is a claim under § 1986 for his failure to prevent or aid in preventing the commission of a violation of § 1985(3) by others, including Mr. Cavuoto.

Mr. Eldridge also moves to dismiss all federal claims against him for failure to state a cause of action. As explained above, the § 1985(3) claim should be dismissed for failure to allege a conspiracy with particularity. Ms. Kern has failed to plead details of time, place, and effect of the conspiracy as well as allege that the violation of Ms. Kern's civil rights was "aimed at" by the conspiracy. Bray, 113 S.Ct. at 762. I therefore dismiss the § 1985(3) claim against Mr. Eldridge for failure to state a claim. Furthermore, because I have dismissed the § 1985(3) claim for failure to state a claim, the § 1986 claim alleged against Mr. Eldridge must be dismissed as derivative. See Rodgers v. Lincoln Towing Service, 771 F.2d 194, 203 (7th Cir. 1985); see also Hahn v. Sargent, 523 F.2d 461 (lst Cir. 1975).

MOTION TO DISMISS BY LOCAL 1071

Local 1071 has moved separately to dismiss the § 1985(3) claim that Ms. Kern has made against it. As discussed above, the plaintiff has failed to allege the time, place, and effect of the alleged conspiracy sufficiently to state a claim under § 1985(3), nor has she alleged that the conspiracy was "aimed at" the violation of her civil rights. Bray, 113 S.Ct. at 762. For these reasons, the § 1985(3) claim against Local 1071 must also be dismissed.

MOTION BY PLAINTIFF TO AMEND COMPLAINT

Plaintiff also moves to amend her complaint to include a claim that the City, RFD, Local 1071, Mr. Cavuoto, and Chief Ippolito violated her rights under Title VII of the Civil Rights Act of 1964. Although she pleads in her complaint that she was expecting a right-to-sue letter rather than having actually received the letter, which is a jurisdictional prerequisite, this minor error in pleading was obviated by the plaintiff's later receipt of the letter.

Federal Rule of Civil Procedure Rule 15(a) directs district courts to allow amendments of pleadings "freely when justice so requires." Nevertheless, denying a request to amend is proper where such an amendment would be futile. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962); Ruffolo v. Oppenheimer & Co, 987 F.2d 129 (2d Cir. 1993). Here, plaintiff attempts to sue the City, RFD, and Chief Ippolito on the basis of Title VII, based solely on the fact that the City and RFD employed Mr. Cavuoto, who allegedly discriminated against Ms. Kern. As the City correctly points out in its brief, plaintiff has advanced no theory of "employment" under Title VII which could conceivably support her position that she is entitled to recover from the governmental agencies which employ a person who acts principally as an agent of an entirely separate employer (in this case Local 1071) when actions she complains of occurred during this collateral

employment relationship. Put simply, the alleged impropriety took place while Mr. Cavuoto was a union official and not while he was an on-duty firefighter. Furthermore, Ms. Kern has never alleged that she was an employee of the City or the RFD, or that the City, RFD, or Chief Ippolito was responsible for any employment actions against her as a result of her engaging in protected activities under Title VII.

Ms. Kern's reliance upon "third-party retaliation" cases is, moreover, misplaced. Those cases typically involve a single employer retaliating against one employee (or group of employees) for action protected under Title VII by another employee. Ms. Kern is attempting to hold a separate employer (RFD) responsible for allegedly retaliating against an entirely different employee (Lt. McMenemy) for taking an internal union grievance. No support in existing law for expanding Title VII to this limit is supplied by the plaintiff, nor could any be found. Therefore, her motion to amend to state a Title VII action against the City, RFD, and Chief Ippolito is denied as futile, because her proposed amended complaint fails to state a cause of action supported by the terms of Title VII and the relevant case law.

Finally, Ms. Kern's motion to amend to state a Title VII action against Local 1071 and Mr. Cavuoto is also denied as futile as she does not plead, nor is it obvious from the face of the amended complaint as presented, that Local 1071 is an employer of 15 employees, as is required for subject matter jurisdiction under the statute. See Shepherdson v. Local Union No. 401, 823 F.Supp. 1245 (E.D.Pa. 1993). While Ms. Kern generally alleges that Local 1071 "is an employer within the meaning of the laws against discrimination/retaliation," she fails to allege in the proposed complaint that Local 1071 employs more than 15 employees. Furthermore, the description of events in her complaint leads me to conclude that Ms. Kern was one of far less than 15 employees of Local 1071 during the operative time period. Furthermore, she

provides no allegations relating to the control of Local 1071 by the International Association of Fire Fighters which would, if sufficient control were alleged, allow the employees of the International to be counted as a single entity with Local 1071, thus providing the required jurisdictional minimum. See Shepherdson, 823 F. Supp. at 1245. Therefore, absent adequate allegation of this court's jurisdiction under Title VII, I deny the Plaintiff's motion to amend the complaint with leave to move to amend her complaint to state such a cause of action against Mr. Cavuoto and Local 1071.

MOTIONS BY ALL DEFENDANTS TO DISMISS STATE CAUSES

All Defendants have moved to dismiss the causes of action against them which arise under New York State law. As no claims remain over which this Court has original jurisdiction, I dismiss the state causes for lack of subject matter jurisdiction, United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), 28 U.S.C. § 1367(c)(3), without prejudice to their reinstatement upon the filing of an amended complaint stating a valid federal cause of action.

OTHER MOTIONS

Plaintiff, perceiving a conflict of interest between John Parrinello's representation of both Local 1071 and Mr. Cavuoto, moves to disqualify Mr. Parrinello as counsel for Mr. Cavuoto. This motion is mooted by the dismissal of the complaint and will not be entertained at this time. For similar reasons, the motion by all defendants to stay discovery is mooted by the dismissal of the complaint.

CONCLUSION

The complaint is dismissed for failure to state a claim and Plaintiff's motion to file the amended complaint as submitted is denied at this time. She is, however, granted leave to move to file an amended complaint setting forth a valid cause of action under §

1985(3) and/or Title VII consistent with this opinion within 30 days of the date of this order.

WHEREFORE, the complaint is dismissed with leave to amend.

ALL OF THE ABOVE IS SO ORDERED.

s/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
November 23, 1993

Statutes Involved:

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the law, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy;; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States the party so injure or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 2000e Definitions

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States a

corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(f) The term "employee" means an individual employed by an employer, except that the term "employee shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chose by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitution or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. §2000e-2 Unlawful employment practices

(c) Labor organization practices

It shall be an unlawful employment practice for labor organization-

(1) to exclude or expel from its membership or otherwise to discriminate against, any individual because of his race, color religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment an individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would

limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

U.S. Const. article I, section 8, cl. 18 Powers of Congress

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof.

Supreme Court Rule 10 Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor full measuring the court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided important federal question in a way that conflicts with a decision by a state court of fast resort; or has so far departed form the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has

decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decision of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rule 15 Briefs in Opposition; Reply Briefs; Supplemental Briefs

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

Federal Rule of Civil Procedure 15 Amended and Supplemental Pleading.

a. **AMENDMENTS**. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the

adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, which ever period may be the longer, unless the court otherwise orders.

New York State Executive Law §292. Definitions

5. The term "employer" does not include any employer with fewer than four persons in his employ.

OPPOSITION

BRIEF

(5)

No. 96-1190

Supreme Court, U.S.
FILED
FEB 24 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

WENDY L. KERN,

Petitioner,

vs.

CITY OF ROCHESTER; FIRE DEPARTMENT of the City of Rochester; POLICE DEPARTMENT of the City of Rochester; ROCHESTER FIREFIGHTERS ASSOCIATION, INC., Local 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS; DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department; CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department and LLOYD ELDRIDGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS CITY OF ROCHESTER; FIRE DEPARTMENT of the City of Rochester; POLICE DEPARTMENT of the City of Rochester and CHARLES D. IPPOLITO

CHARLES D. STEINMAN, ESQ.
Municipal Attorney
Attorney for Respondents, City of Rochester, Fire Department of the City of Rochester, Police Department of the City of Rochester and Charles D. Ippolito
400A City Hall — 30 Church Street
Rochester, New York 14614
Telephone: (716) 428-6812

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Second Circuit correctly hold that the petitioner failed to state a cause of action under 42 U.S.C. §1983 where the pleadings revealed that:

   a. none of the actions of which she complained were taken under color of state law;

   b. that the alleged actions of the union president were not pursuant to any municipal custom or policy; and

   c. the retaliation complained of by the petitioner was allegedly against a third party and not the petitioner?

2. Did the Court of Appeals correctly hold that the petitioner was not an employee of the city respondents for the purposes of the anti-discrimination and anti-retaliation provisions of Title VII where the pleadings established that the petitioner worked solely for the local firefighter's union, that the city respondents exercised no control over her or the terms of her employment and that they had no impact on her employment by the union?

3. Did the Court of Appeals properly dismiss the petitioner's conspiracy claim under 42 U.S.C. §1985(3) where there was no showing of the time and place of the alleged conspiratorial activity?

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SUMMARY OF ARGUMENT

The petitioner, who was a full-time employee of the City of Rochester firefighter's union, was not an employee of the City of Rochester and, therefore, can seek no redress against the City under Title VII for the alleged sexual harassment and discrimination by her employer, the union president. In addition, the alleged acts of the union president were done under his authority as union president and, consequently, were not under color of state law for purposes of 42 U.S.C. §1983.

PRELIMINARY STATEMENT

This brief is submitted on behalf of the respondents City of Rochester, the Fire Department of the City of Rochester, the Police Department of the City of Rochester and Charles D. Ippolito, individually and as Chief[1] of the City of Rochester Fire Department (hereafter "city respondents") in opposition to the petition for a writ of certiorari to the Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

A. Facts

The plaintiff-petitioner, Wendy Kern (hereafter "petitioner") was hired on or about September 1, 1992 as a secretary by the Rochester (New York) Firefighters Association, Inc., Local 1071, International Association of Firefighters (hereafter "Local 1071" and "IAFF", respectively). Her immediate supervisor was Daniel Cavuoto, the president of Local 1071. Mr. Cavuoto was also a lieutenant in the Rochester Fire Department at the time of the incidents alleged in the complaint. However, as union president Cavuoto had been fully released by the city from any and all duties as a Rochester Fire Department employee so that he could devote

[1] Mr. Ippolito has since retired from this position.

the time he would otherwise have spent working for the city attending to his union responsibilities.

The petitioner alleges that from the date of her employment until December 30, 1992, she was sexually harassed and discriminated against by Cavuoto. The petitioner further alleges that on December 30, 1993, Cavuoto and his business partner, Lloyd Eldridge, encouraged her to drink an excessive amount of liquor at the offices of Life Safety, a business owned by Cavuoto and Eldridge. As a result of her inebriation, the petitioner allegedly lost consciousness and awoke to find herself partially disrobed and Cavuoto standing above her, naked below the waist. The petitioner did not go to the police or seek any medical intervention at that time.

On January 19, 1993, the petitioner complained about the December 30 incident to John McMenemy, the union treasurer, who was also a lieutenant in the Rochester Fire Department. On February 24, 1993, the petitioner and her counsel made an appointment to make a report to the Rochester Police Department about the incident. The petitioner subsequently related the incident to Investigators Salvatore Ruvio and Vito D'Ambrosio. The petitioner claims that she made the investigators aware of the sensitive nature of the allegations arid that they promised to notify her before contacting Cavuoto about the charges. Allegedly, Ruvio and D'Ambrosio were friends of Cavuoto's and did not disclose this supposed fact to her.[2]

On the evening of February 25, 1993, the petitioner's charges against Cavuoto supposedly became known in the Fire Department. At petitioner's request the union made arrangements the next day to place her on leave status from her job with full pay. The petitioner subsequently quit her job with the union.

The petitioner concedes that prior to December 30, 1992, she

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[2] Both detectives denied being friends with Cavuoto.

never complained about Cavuoto's conduct to anyone in the Rochester Fire Department and that she had no information to suggest that anyone in the Fire Department had any knowledge of Cavuoto's treatment of her. Nevertheless, the petitioner alleges that the city respondents supposedly knew of Cavuoto having made unwanted sexual advances to other women. As elucidated by Lt. McMenemy, Cavuoto allegedly had a "reputation for soliciting women for sex and/or sexually harassing them". Lt. McMenemy further averred that Cavuoto had a reputation for being a "pig" as to women and that he (Cavuoto) had stated that he "hires his secretary with fast hands and slow lips".

Finally, the petitioner alleged that Chief Ippolito retaliated against Lt. McMenemy by denying him a promotion based upon the fact that he took the petitioner's complaint.

B. Procedural History

The petitioner's complaint was filed in the District Court for the Western District of New York on June 28, 1993 . The four causes of action asserted against the city respondents were based upon the alleged violation of 42 U.S.C. §§ 1983, 1985(3) and the New York Human Rights Law (N.Y. Executive Law, Art. 15, §290, *et seq.*).

By a Notice of Motion dated July 19, 1993 the city respondents[3] moved to dismiss the complaint on the grounds that it failed to state a cause of action. Similar relief was sought by the remaining respondents. The petitioner both opposed the motions and moved to amend her complaint to add a cause of action pursuant to Title VII of the Civil Rights act of 1964 against the city respondents.

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[3] At the time of the motion, Cavuoto was represented by counsel for the City of Rochester, who moved for dismissal on his behalf as well as on behalf of the other city respondents. Cavuoto is now represented by separate counsel.

On November 23, 1993, the District Court (Telesca, C.J.) issued a Decision and Order resolving the parties' respective motions. The Court held that the petitioner's claims under §§1983 and 1985(3) were legally insufficient and should be dismissed. Since there were no pending federal claims to which the state law causes of action could attach, the Court also dismissed those claims for lack of subject matter jurisdiction. Finally, the Court denied as futile the petitioner's motion to amend as against the city respondents, holding that there was no viable cause of action against them under Title VII. However, the Court held that the petitioner could, consistent with the decision, move to file an amended complaint setting forth a valid cause of action under §1985(3) and/or Title VII against the remaining respondents.

By a Notice of Motion dated January 18, 1994, the petitioner moved for reconsideration of the Court's November 23, 1993 decision and for leave to add a Title VII cause of action against the non-city respondents. On December 1, 1994, the. District Court denied the motion for reconsideration but ordered a hearing to determine whether or not Local 1071 was an "employer" as defined under Title VII. A hearing on this issue was held on August 14, 1995. On October 5, 1995, the District Court issued a Decision and Order holding that Local 1071 did not have the requisite number of employees to constitute an "employer" within the meaning of Title VII. Based upon this finding, the District Court dismissed the complaint in its entirety.

On November 6, 1995, the petitioner filed her Notice of Appeal to the Court of Appeals for the Second Circuit from all three of the foregoing orders. In a unanimous decision, the Court of Appeals affirmed the District Court's judgment dismissing the petitioner's claims (see *Kern v. City of Rochester. et al.*, 93 F.2d 38 [2d Cir. 1996]). A subsequent petition for rehearing and rehearing *en banc* was denied on October 15, 1996.

ARGUMENT

POINT I
THE COURT OF APPEALS CORRECTLY HELD THAT THE CITY RESPONDENTS WERE NOT LIABLE TO THE PETITIONER UNDER TITLE VII FOR THE ALLEGED SEXUAL HARASSMENT BY CAVUOTO.

A. The Title VII Discrimination Claims

The first argument advanced by the petitioner is that the court below erred in denying as futile her motion for leave to amend her complaint to add a Title VII cause of action against the city respondents. Specifically, the petitioner avers that the absence of an employer-employee relationship between herself and the City of Rochester is not fatal to her proposed cause of action. We respectfully submit that the Court of Appeals was clearly correct in its determination.

Under Title VII, it is an "unlawful employment practice" for an employer:

> "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . .; or
>
> to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" 42 U.S.C. §§2000e-(a)(l), 2000e-3(a).

The federal courts have repeatedly stressed that the intent of Title VII is to prohibit employers from engaging in these activities with respect to their employees:

> "Title VII is an *employment* law, available only to employees (or prospective employees) seeking redress for the unlawful employment practices of their employers" *Tadros v. Coleman*, 717 F. Supp. 996, 1002 (S.D N.Y. 1989) (emphasis in original).

The court in *Tadros* went on to hold that:

> "It is axiomatic that a would-be plaintiff must have rendered to the defendant some kind of service to sue under Title VII. That service, moreover, must have been one from which the putative employer willingly derived a benefit" *Id*, at 1003.

Similarly, in *Hill v. New York City Board of Education*, 808 F.Supp. 141 (E.D.N.Y., 1992), the court held that the:

> ". . . fundamental predicate for Title VII liability [is] the existence of an *employment* relationship between the one who discriminates and the one who finds himself the victim of that discrimination" (emphasis in original) *Id*, at 146.

See also, *Wheeler v. Main Hurdman*, 825 F.2d 257 (10th Cir., 1987), *cert. denied*, 484 U.S. 987, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987):

> "[T]he word 'employee', however broadly defined, is still 'employee', and circumscribed by meanings reasonably related to that word. Drafters of the statute gave no indication that they were departing from the common discourse of the republic when fashioning a word to be understood and applied by its citizens" *Id*, at 276.

See also, *Stetka v. Hunt Real Estate Corp.*, 859 F.Supp. 661 (W.D.N.Y., 1994) (to prevail on a Title VII claim plaintiff must prove existence of employment relationship).

In determining whether an individual is an employer, a number of courts have held that an inquiry must be held into the economic reality of the relationship. Such an inquiry includes:

> "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983); see also, *Carter v. Dutchess County Community College*, 735 F.2d 8 (2d Cir. 1984).

Applying the foregoing standard, the petitioner is obviously not an employee of the City of Rochester. It is undisputed that the city respondents had no authority to hire or fire the petitioner, to supervise her work schedule or conditions of employment, to determine her rate or method or payment and maintained no records with respect to her employment. Thus, by the traditional economic reality test, as well as by reference to any commonly understood meaning of the word the petitioner was not an employee of the city respondents.

The reed to which the petitioner clings is the line of cases which have held that, in certain narrowly defined circumstances, the definition of "employer" may be expanded to include "any party who significantly affects access of any individual to employment opportunities" (*Vanguard Justice Society Inc. v. Hughes*, 471 F.Supp. 670, 696 [D.Md. 1979]). However, an analysis of these cases reveals that they are clearly distinguishable from the case at bar.

In *Spirt v. Teachers Insurance and Annuity Assn.*, 691 F.2d 1054, 1063 [2d Cir. 1982], *vacated and remanded* 463 U.S. 1223, 103 S.Ct. 3565, 77 L.Ed.2d 1406 (1983), the plaintiff was a tenured college professor who claimed that her university and two retirement annuity plans (TIAA and CREF) engaged in sex discrimination by employing sex-segregated mortality tables. Participation in the plans was mandatory and the university shared administrative responsibility over the funds. In determining TIAA-

CREF's status as an employer under Title VII, the court stressed that these retirement plans were the delegees of the university's responsibility to manage their employee's retirement plans and were performing this function on the university's behalf. The court further stressed that the intertwined nature of the relationship between TIAA-CREF and the university warranted classifying both of them as employers:

> ". . . TIAA and CREF, which exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities . . . that they must be deemed an 'employer' for purposes of Title VII. It is also relevant that participation in TIAA-CREF is mandatory for tenured faculty members at LIU, and that LIU shares in the administrative responsibilities that result from its faculty members' participation in TIAA-CREF" *Id*, at 1063.

The petitioner sought to rely on *Spirt* in the Court of Appeals. However, as that Court instructed the petitioner, the differences between the facts in *Spirt* and those in the present case are manifest:

> "Local 1071, unlike LIU in *Spirt*, has not delegated any of its employment responsibilities to the City. Furthermore, there is no indication that the City shared any of Local 1071's administrative responsibilities. The City had no authority to hire or fire Kern, to supervise her work or conditions of employment, to determine her rate or method of pay, or to maintain records of her employment. Indeed, Kern fails to allege that her employment at Local 1071 was affected by the City in any way. The only connection that Kern alleges between the City and her employment at Local 1071 is that Local 1071 — and therefore her job — would not exist without a city fire department. However, we think that this relationship is too tenuous to bring the City under the Title VII definition of employer". *Kern, supra*, 45 [2d Cir. 1996].

[2d Cir. 1996].

The petitioner can find no solace in the other cases upon which she relies (see Petition, p. 11-13). In most of the cases cited, the plaintiffs were individuals who were independent doctors or nurses who, because they were denied privileges at hospitals, were actually denied the opportunity to work (see *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 [D.C. Cir. 1973] [hospital barred private duty nurses who were working independently for patients from working at hospital]; *Doe v. St. Joseph's Hospital*, 788 F.2d 411 [7th Cir. 1986] [non-employee physician denied ability to admit and treat patients at hospital]; *Christopher v. Stouder Memorial Hospital*, 936 F.2d 870 [6th Cir. 1991], *cert. denied* 112 S.Ct 658 [1991]; *Zaklama v. Mt. Sinai Medical Center*, 842 F.2d 291 [11th Cir. 1988]; *Gomez v. Alexian Bros. Hospital of San Jose*, 698 F.2d 411 [9th Cir. 1983]). The other cases cited by petitioner similarly address cases where an individual was actually denied the opportunity to work, or, like the plaintiff in *Spirt*, was discriminated against by a party who was closely intertwined with an employer (see *Puntolillo v. New Hampshire Racing Commission*, 375 F.Supp. 1089 [D.N.H. 1974] [plaintiffs were driver-trainers of race horses who were denied ability to race and earn a living at the race tracks controlled by the state regulatory agency]; *Carparts Distribution Center. v. Automotive Wholesaler's Ass'n of New England. Inc.*, 37 F.3d 12 [lst Cir. 1994]) (sole stockholder of company discriminated against by self-funded medical insurance plan). In the present case, the City of Rochester did not prevent the petitioner from working, either directly or indirectly. Similarly, the city and the union are clearly not united in interest and performing services for each other, as in *Spirt* and *Carparts*. Thus, these cases cannot avail the petitioner.

Despite the foregoing, the petitioner persists in her claim that the city respondents were her "employers" under Title VII on the grounds that they allegedly "significantly affected" her

employment by their various alleged actions and inactions (see *Spirt, supra*, at 1054; Petition, p. 14). Even assuming, *arguendo*, the truth of these allegations, they simply do not rise to the level of interference recognized by the courts as necessary to warrant classifying a defendant as an employer for the purposes of Title VII. Irrespective of what the city respondents did or did not do, the petitioner was not prevented from working in any manner, nor was her access to employment impeded. Even assuming that discrimination occurred, this simply does not make the city respondents employers. As the courts have recognized, the fact that someone has been discriminated against does not, *ipso facto*, make them an employee:

> "To suggest that Congress intended the provisions of Title VII . . . to reach all situations where discrimination may arise in a business setting is to suggest that it enacted these statutes with the intent that they cover all individuals having an economic relationship with a business. This would make employee status largely irrelevant and would essentially transform the employment discrimination statutes in to *business* discrimination statutes. If this were the case, then we must question why Congress bothered to limit each statute's reach to employment practices. The requirement that the statutes cover only employment situations suggests that Congress perceived a need to limit the application of these statutes" *Wheeler v. Main Hurdman, supra*, at 275-276.

Based upon the foregoing, we respectfully submit that this Court should reject the petitioner's invitation to expand the definition of "employer" to such unprecedented limits. The city respondents were not the petitioner's employer under any reasonable definition of the term, or under any standard recognized by any of the federal courts. As both courts below correctly held, there is simply no reasonable nexus between the petitioner and the city respondents sufficient to warrant classifying them as the petitioner's employer for Title VII purposes.

B. The Title VII Retaliation Claims

The next argument advanced by the petitioner is that she should have been permitted to add a Title VII cause of action which would have alleged that the city respondents retaliated against her by not promoting Lt. McMenemy. As the court below correctly held, this argument is wholly without merit.

The so-called "retaliation" provisions of Title VII make it an unlawful employment practice to retaliate against an employee for engaging in activities protected by that title (see 42 U.S.C. §2000e-3[a], quoted at p.6, *supra*). The prima facie elements of retaliation are:

> "(1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his [or her] civil rights was known by the defendant; (3) that, thereafter, the defendant took an *employment action adverse to the plaintiff*; (4) that there was a causal connection between the protected activity and the adverse employment action" *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987) (emphasis supplied).

The obvious purpose of the statute is to prevent employers from retaliating against their employees for engaging in Title VII activities. The fatal flaw in the petitioner's argument is that the petitioner was not an employee of the City of Rochester. The city did not, and, indeed, could not, take any employment action adverse to the petitioner. As such, the foregoing provisions of Title VII are clearly inapplicable.

The petitioner broadly alleges that "Title VII prohibits reprisals against victims of discrimination as well as those who assist with their complaints and/or those who are closely related to the victim/complainant" (Petition, p. 15, citing *McDonnell v. Cisneros*, 84 F.3d 256 [7th Cir. 1996], *EEOC v. Ohio Edison Co.*, 7 F.3d 541 [6th Cir. 1993] and *Wu v. Thomas*, 863 F.2d 1543 [11th Cir. 1989]). While it is true, as the petitioner argues, that the courts have

recognized the viability of a Title VII action for "third-party" retaliation, they have never made such actions available to persons similarly situated to the petitioner. Thus, if an entity engages in retaliatory activities against a person which substantially affect *that person's employment,* the retaliating entity may be deemed an "employer" for purposes of Title VII (see *LeMasters v. The Christ Hospital*, 777 F. Supp. 1378 [D.Oh. 1991] [hospital retaliated against doctor by suspending his admitting privileges]; *Save v. St. Vrain Valley School Dist. Re-1J*, 785 F.2d 862 [10th Cir. 1986] [retaliatory non-renewal of teacher's contract for engaging in union activities]; *Christopher, supra* [hospital retaliated against private duty nurse working for individual doctors, thereby rendering her unable to work]. Thus, while a non-employee may sue for retaliation against him/her *if his/her employment has been substantially effected*, such is simply not the case here. As the District Court correctly found, the alleged retaliation was against Lt. McMenemy, not the petitioner, and she has utterly failed to demonstrate how her employment was substantially effected by any allegedly retaliatory actions taken against Lt. McMenemy.

Absent the existence of an employer-employee relationship between the employer and the person retaliated against, the courts have uniformly rejected attempts by non-employee interlopers to avail themselves to Title VII protections. Thus, in *Asklar v. Honeywell. Inc.*, 95 F.R.D. 419 (D.Conn. 1982), the plaintiff was the widow of a former employee of the defendant who was allegedly discriminated against in violation of the Age Discrimination in Employment Act ("ADEA"; 29 U.S.C. §§621-624). Noting that the anti-retaliatory provisions of the ADEA were "nearly identical" to those in Title VII (*Id*, at 424), the court dismissed the action for lack of standing on the part of the non-employee widow, stating:

> "No court has extended the scope of a retaliation provision beyond the bounds of an employer-employee relationship" *Id*, at 435.

Similarly, in *Hale v. Marsh*, 808 F.2d 616 (7th Cir. 1986), the plaintiff was an OSHA employee who assisted an Army employee with a complaint of racial discrimination against the Army. When the Army sent a letter of complaint to OSHA regarding the plaintiff's activities, he sued the Army under the anti-retaliation provisions of Title VII. The court held that a Title VII plaintiff could not base such an action upon retaliation by another person's employer against the plaintiff:

> "The interest he asserts is too tenuous, legally and factually, to warrant an adventurous interpretation of the retaliation provisions of Title VII" *Id*, at 620, citing *Asklar, supra*.

In sum, no case has ever extended Title VII retaliation protection to non-employees such as the petitioner. Thus, we submit that the court below correctly concluded that she lacked standing to assert any retaliation against Lt. McMenemy as a basis for Title VII relief.

POINT II

THE CITY RESPONDENTS ARE NOT LIABLE TO THE PETITIONER FOR CAVUOTO'S ALLEGED CONDUCT UNDER 42 U.S.C. §1983.

The petitioner's next assignment of error is that the Court of Appeals should not have dismissed her claims that the city respondents violated her civil rights, as proscribed by 42 U.S.C. §1983. We respectfully submit that the Court of Appeals properly concluded that these claims, even if assumed to be true, did not state a cause of action under this statute.

Section 1983 provides a civil action for the deprivation of rights by officials of various governmental entities:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . .

> subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

Relying upon this statute, the petitioner argues that the city respondents are liable to her for the alleged sexual harassment and discrimination by Cavuoto. In addition to asserting that the city respondents are directly liable for Cavuoto's actions, the petitioner also argues that the city respondents are liable to her since they allegedly knew that Cavuoto was a "womanizer" and did not take any prior action to discipline him. The petitioner also asserts violations of her First Amendment and due process rights. As the Court of Appeals correctly held, these arguments are wholly without merit.

The petitioner's attempt to premise municipal liability on the acts of Cavuoto should be summarily denied. In order to proceed on a claim pursuant to §1983, the petitioner must plead and prove a violation of her rights made "under color of law". This requirement can only be satisfied when a defendant's conduct constitutes the:

> ". . . misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . ." *National Collegiate Athletic Association v. Tarkanian*, 109 S.Ct. 454, 461 (1988), quoting *United States v. Classic*, 313 U.S. 299, 326 (1941) (emphasis added).

Stated in other terms, the color of state law requirement is satisfied when a defendant:

> "act[s] in his official capacity or when exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. 42, 50, 108 S.Ct. 2250, 2255 (1988).

In order to determine whether Cavuoto was acting under color of state law, the source of his authority and whether or not such authority devolved from a grant of power from the state must be determined (*Temple v. Albert*, 719 F.Supp. 265, 267 [S.D.N.Y. 1989]). The mere fact that the defendant was employed by a state or municipality does not necessarily mean that his actions are taken under color of state law where the state has no authority over his actions (*Polk County v. Dodson*, 454 U.S. 312, 321, 102 S.Ct. 445, 451 [1981]).

In the present case, the petitioner struggles mightily to find some official basis for Cavuoto's actions. Thus, she variously argues that:

1. the city promoted Cavuoto to his supervisory position;

2. the city chose to permit Cavuoto to work in the union office while paying him his regular pay;

3. the incidents complained of occurred during Cavuoto's work day while on pay from the city;

4. the incidents occurred in the union office where Cavuoto met with city employees

None of this avails the petitioner. The city may have promoted Cavuoto to his position *in the Fire Department*, but they did not elect him union president, an election he could have won irrespective of his rank. In addition, irrespective of whether the city paid Cavuoto or not, his work in the union office was not at the city's behest and was not subject to the city's control. This is not altered by the fact that the incidents occurred during normal business hours, or in a place where Cavuoto met with other city employees. Whether they did or not, the salient point is that the incidents complained of occurred while Cavuoto was performing solely union, not city, functions. The incident involved the union president and the union's secretary. Thus, Cavuoto's authority devolved from his position as union president, not as city

firefighter. As the Court of Appeals properly held, Cavuoto was not acting in any official capacity when he allegedly sexually harassed the petitioner. For this reason, the petitioner's attempt to make the city respondents liable for Cavuoto's actions should be rejected.

The petitioner next argues that the city respondents should be liable to her because they allegedly knew that Cavuoto was a "womanizer" and did not discipline him. However, an examination of the facts asserted by the petitioner in support of this claim reveal that they are woefully insufficient to put the city on notice that Cavuoto posed a threat to her. Thus, the complaint states, in wholly conclusory fashion, that "defendant Ippolito and other city employees have knowledge of defendant Cavuoto making uninvited and unwanted sexual advances to other women". When the city petitioners made their motion to dismiss, the only proof offered in support of this allegation was an affidavit from Lt. McMenemy which stated that:

> "I am aware of Lt. Cavuoto's reputation for soliciting women for sex and/or sexually harassing them. Mrs. Kern's predecessor, Irma Eichner complained to me that Lt. Cavuoto was hitting on her for sex frequently.
>
> Lt. Cavuoto's reputation for being a 'pig' as to women is well known in the City Fire Department. Other fire fighters have told me that Lt. Cavuoto has stated to them on the job that he hires his secretary with fast hands and slow lips".

These allegations, reprehensible as they are, do not advance the petitioner's theory that the city respondents ignored complaints about Cavuoto's behavior. While Lt. McMenemy may have been aware of Cavuoto's reputation for sexual harassment, no proof was ever submitted that he ever brought this hearsay information to the attention of any of Cavuoto's supervisors.[4] Similarly, there is no proof that he, or anyone else, ever came forward with Ms.

[4] In support of this, former Chief Ippolito affirmed that he was unaware of any mistreatment of the petitioner or any other female by Cavuoto.

Eichner's allegations. The alleged fact that Cavuoto had a reputation for being a "pig" or that he hired his union secretaries in a sexually inappropriate manner suffers from the same flaw: there is no proof that anyone ever complained to Cavuoto's supervisors. As the Court of Appeals accurately observed:

> "[T]here is no indication that either the City or Cavuoto's superiors at the RFD knew of Cavuoto's alleged womanizing. The record does not reveal that, prior to Cavuoto's alleged assault, Kern or anyone else ever complained about Cavuoto to the City or to Cavuoto's superiors at the RFD" *Kern, supra* at 44.

Finally, the petitioner argues, in wholly conclusory terms, that the city respondents violated the petitioner's First Amendment and due process rights. These claims are without merit. The complaint fails to state in any manner how her First Amendment rights were violated. A bare assertion in a complaint that some unspecified conduct somehow infringed upon a plaintiff's First Amendment rights is too remote and speculative to state a justiciable case or controversy (*Spear v. Town of West Hartford*, 954 F.2d 63, 67 [2d Cir 1992]).

Similarly defective are the petitioner's claims that the city respondents violated her due process rights when they assigned the detectives who allegedly knew Cavuoto. A due process violation may occur when police action "shocks the conscience" *Rochin v. California*, 34 U.S. 165, 172, 173, 72 S.Ct. 205, 96 L.Ed. 18 (1952); *White v. Rochford*, 592 F.2d 381, 383 (7th Cir. 1979). Even assuming the facts as stated by petitioner, the actions complained of simply do not rise to this level. First, the police investigation targeted Cavuoto, not the petitioner. The petitioner does not explain how such a criminal investigation, directed at another party, implicated any of her due process rights in any manner. In addition, the petitioner seeks to dramatize the facts by claiming that her life was jeopardized by the disclosure of the

existence of the police investigation without prior notice to her. However, this claim cannot withstand even cursory scrutiny. The petitioner was Cavuoto's employee. He knew her phone number and, presumably, her address. Obviously, if Cavuoto wanted to assault the petitioner, he could have done so at a time and place of his choosing. Thus, if the petitioner's life was placed in jeopardy as a result of her going to the police, the timing of the disclosure of that fact to Cavuoto was irrelevant. At a minimum, such disclosure does not rise to the level of a due process violation.[5]

POINT III

PETITIONER'S COMPLAINT FAILS TO SUFFICIENTLY ALLEGE A CLAIM FOR CONSPIRACY UNDER 42 U.S.C. 1985(3).

In order to sufficiently allege a conspiracy, the complaint must contain more than mere conclusory allegations. *Dwares v. City of New York*, 985 F.2d 94, 99 (2nd Cir 1993). The complaint should afford some "details of time and place of the alleged effect of the conspiracy." *Id*, at 99 (quoting 2A Moore's Federal Practice p 8.17 [6] at 8-109 to 8-110. [2d ed. 1992]). Complaints containing conclusory, vague or general allegations concerning a conspiracy to deprive someone of their civil rights are properly dismissed. *Id*. Since the petitioner's complaint is clearly deficient under this standard, it was properly dismissed.

In any event, petitioner's 1985 claim was properly dismissed as there is no allegation nor evidence that the city respondents' conduct was aimed at and for the purpose of denying petitioner her constitutional rights. *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039, (2d Cir 1993). This Court has indicated

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[5] Compare with *White v. Rochford, supra*, where police arrested an individual for drug dealing and left his infant nephews without adult protection in an abandoned automobile on the side of the road on a cold evening.

that the "conscious objective of the (conspiracy) enterprise" must be to impair the right in question. *Bray v. Alexandria Clinic*, 506 US 263, 113 S. Ct. 753, 122 L.Ed. 2d 34, 50 [1993]). The mere fact that an alleged conspiracy has the effect of a constitutional violation is not enough. The very purpose of the conspiracy must be aimed at denying the protected right. *Id.* The city respondents must have acted, at least in part, for the very purpose of producing the deprivation of rights. *Id.* As the District Court observed, no such allegation was made by the petitioner.

The city respondents further assert that the petitioner's claim under 42 U.S.C. 1985 was correctly dismissed for failure to comply with *Bray's* requirement that the conspiracy be motivated by animus against a particular "class" of individuals. The stated intent of this requirement was to limit the speculative extension of Section 1985(3) from innumerable tort plaintiffs. The Court of Appeals for the Second Circuit amplified this Court's pronouncements in *Town of West Hartford, supra*, at p. 1046, noting that simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with would convert Section 1985 into a "general federal tort law" which the animus requirement specifically seeks to avoid. The Court went on, quoting Justice Blackmun from *Carpenters v. Scott*, 463 U.S. 825, that the class "cannot be defined simply as the group of victims of the tortious action."

The complaint in the instant action contains the bare allegation that the acts of the city respondents were "committed with a (sic) invidiously discriminatory animus against woman as a class". What is apparent is that petitioner's claim does not involve a class at all. The petitioner was the sole female employee of the local firefighters union. She is attempting to turn her alleged tort case into a federal conspiracy case by using magic words and unfounded allegations. In *Bray*, this Court found that the section of 1985(3) here in issue did not apply to prevent Operation Rescue

from conspiring to prevent women from getting abortions across the country. Certainly if 1985(3) does not apply to a situation where there is open and notorious conspiratorial action on a nationwide basis, there can be little doubt that it is not applicable to the situation at bar. In any event, since this Court has never reached the issue, we submit that §1985(3) does not apply to the class alleged in the complaint.

Based upon the foregoing, we submit that the Court of Appeals properly affirmed the dismissal the petitioner's cause of action under 42 U.S.C. §1985(3).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

CHARLES D. STEINMAN, ESQ.
Municipal Attorney
Attorney for Respondents City of Rochester, Fire Department of the City of Rochester, Police Department of the City of Rochester and Charles D. Ippolito
400A City Hall – 30 Church Street
Rochester, New York 14614
Telephone: (716) 428-6812